IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No 135 of 1988

For Approval and Signature:

Hon'ble MR.JUSTICE R.K.ABICHANDANI
and
Hon'ble MR.JUSTICE KUNDAN SINGH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

COMMISSIONER OF INCOME TAX

Versus

HAZARAT PIR SHAH-E-ALAM ROZA ESTATE TRUST

Appearance:

MR B.B. NAIK, Standing counsel for the Revenue
MR S.N. SOPARKAR, Sr. Advocate with Mr.M.K.Kaji
and Mrs. Swati Soparkar, Advocates for the Assessee

CORAM : MR.JUSTICE R.K.ABICHANDANI
and
MR.JUSTICE KUNDAN SINGH

Date of decision: 11/04/2002

ORAL JUDGEMENT

(Per : MR.JUSTICE R.K.ABICHANDANI for the Court)

1. This reference arises from the order of the Income Tax Appellate Tribunal, Ahmedabad `A' passed in a group of 20 appeals related to the Assessment Years 1964-65 to 1969-70, 1972-73 and 1973-74, in which the controversy before us revolved around the issue as to whether the income from the lands in question was the income of the Hazarat Pir Shah-E-Alam Roza Estate Trust (hereinafter referred to as `the Roza Trust') assessable in the hands of the said Trust and exempt under section 11 of the Income Tax Act, 1961 (hereinafter referred to as `the said Act'), or whether it was assessable in the hands of the Sajjadanashin of the Trust Saiyed Musamiya as income from his private property.

2. The Tribunal has concluded that the lands in question were wakf properties belonging to the Roza Trust, and that the exemption under section 11 of the said Act was available to the assessee - Roza Trust, provided the conditions mentioned therein are fulfilled. It was held that the actual expenditure on the Sajjadanashin and his family not exceeding Rs.30,000=00 would not be included in the income of the Roza Trust, but such amount spent by the assessee Sajjadanashin on his maintenance as Madad-E-Maash was taxable in his hands as income. The Tribunal restored the matter to the Income Tax Officer to assess the income of Rasulabad, Vasna, Isanpur and Sarsa lands as the income of the Roza Trust and grant the benefit under section 11 subject on fulfillment of the conditions mentioned therein, bearing in mind that the income actually spent by Sajjadanashin on his maintenance not exceeding Rs.30,000=00 was not to be included in the income of the Roza Trust.

3. The Tribunal has in the above background referred the following questions in Income Tax Reference No. 135 of 1988 for the opinion of this Court under section 256(1) of the said Act :

"Questions at the instance of the Revenue (In Revenue Appeal Nos.402 to 409/Ahd/1985) :

[1] Whether on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal has been right in law in holding that the assessee Roza is a wakf and the complex of buildings and lands at Rasulabad were wakf properties belonging to it by dedication and user ?

[2] Whether, on the facts and in the circumstances of the case, the Appellate Tribunal has been right in law in holding that the lands at Vasna, Isanpur and Sarsa were wakf properties belonging to the Roza by virtue of Sanad of Aurangzeb?

[3] Whether, the Appellate Tribunal has been right in law and on facts in holding that the income of Roza was eligible to exemption under section 11 of the Income Tax Act, 1961 if assessee Roza satisfied the conditions mentioned in the said section?

[4] Whether, the Appellate Tribunal has been right in law and on facts in holding that the actual expenditure on the maintenance of the Sajjadanashin and his family not exceeding Rs.30,000=00 a year would not be included in the income of Roza?

Questions at the instance of the Revenue in Revenue Appeal Nos. 410 to 413/Ahd/1985 :

[1] Whether, the Appellate Tribunal has not erred in law and on facts in holding that the properties at Rasulabad, Vasna, Isanpur and Sarsa belonged to Shah-E-Alam Roza at Ahmedabad and not to the assessee individual and hence the income thereof was not liable to be assessed in the hands of the assessee?

[2] Whether, the Appellate tribunal has not erred in law and on facts in holding that the Bombay High Court decision wherein the assessee had taken the stand that the properties belonged to him individually and not to the trust, did not operate as res judicata and the assessee was not prevented from taking the stand that the properties belonged to Roza Trust?

[3] Whether, the Appellate Tribunal has not erred in law and on facts in holding that income spent by the assessee Razvi on his maintenance and Madad-E-Maash was only taxable in his hands?

Questions at the instance of the Revenue in Revenue Appeal Nos.384 to 387/Ahd/1985 :

[1] Whether, on the facts and in the circumstances of the case, the Tribunal was justified in law in holding that all the properties, lands and buildings at Rasulabad are wakf properties by user?

[2] Whether, on the facts and in the circumstances of the case, the Tribunal was justified in law in holding that the income spent by the assessee Razvi on his maintenance and Madad-E-Maash was taxable income in the hands of the assessee?

[3] Whether, the Tribunal was justified in law in holding that the maintenance and Madad-E-Maash expenditure incurred by the Trust on assessee and his family members was not expenditure for Khankah but was taxable income of the Sajjadanashin?

Questions at the instance of the assessee - Roza Trust in Revenue Appeal Nos. 388 to 398/ Ahd/1985:

[1] Whether, on the facts and in the circumstances of the case, the Tribunal was justified in law in holding that the maintenance and Madad-E-Maash expenditure incurred by the trust on Sajjadanashin and his family members was not expenditure for Khankah?

[2] Whether, on the facts and in the circumstances of the case, the Tribunal was justified in law in holding that actual expenditure incurred (not exceeding Rs.30,000=00 a year) in maintenance of Sajjadanashin and his family was not the income of the trust?

[3] Whether, the Tribunal was justified in law in holding that the British Sanad granted to the assessee were not the documents of title?"

4. Much historical interest has been evinced by the authorities and a detailed account is given in their orders with a historian's thrill to show as to how the

Dargah of Hazarat Pir Shah-E-Alam came into existence when the Roza was constructed during 1531 - 41 A.D. by a noble man of the Court of Sultan Bahadur Shah over the tomb of the great muslim sage who died in 1475 A.D. and how Diwankhana came to be built in 1570 - 73 by Sultan Muzaffer Shah III. These facts found mention in the Bombay Gazette Volume IV at pages 286-87. The lands of six villages, including the four which were the subject matter of the assessment proceedings, are said to have been granted by the Mogal Emperor Aurangzeb for the up-keep of the Roza in the year 1670 A.D. under a Sanad and grants were confirmed by the Sanads issued during the British regime.

5. It appears from the record that a suo motu inquiry was started under section 19 of the Bombay Public Trusts Act, 1950 (hereinafter referred to as `the Trusts Act of 1950') by order dated 7th march 1956 (Inquiry No. 176 of 1956) passed by the Deputy Charity Commissioner who had chosen the assessors to aid and assist him. As a result of that inquiry, the Deputy Charity Commissioner, Ahmedabad Region, made an order on August 10, 1962 directing that the said Trust be registered as a Public trust in the Public Trust Registration Office, Section `B' for Ahmedabad. Appeals were filed against that order before the Charity Commissioner, Gujarat State, Ahmedabad (Appeal Nos. 60 to 71 of 1962) and the Charity Commissioner by a very elaborate reasoned order dated 20-1-1966 dismissed both the appeals, confirming the order of the Deputy Charity Commissioner that the said Roza trust was a public trust and that the lands of villages Vasna, Isanpur and Sarsa were the properties of the said trust and setting aside the finding of the Deputy Charity Commissioner about the Rasulabad lands by holding that those lands were also the property of the trust. It is stated that an application under section 72 of the said Trusts Act of 1950 was filed and has been pending, but there has not been any stay of the order of the Charity Commissioner, by which it was held that the Roza was a registered public trust and these lands of four villages were registered as the properties of the said wakf.

6. The Income Tax Officer assessed the income of villages Vasna, Isanpur and Sarsa as well as the income from Rasulabad land as the income in the hands of the assessee Sajjadanashin Saiyed Musamiya Haiderbux Razvi. Protective assessment was, however, made in respect of that income in the name of the assessee Roza Trust. In the appeals, the Assistant Appellate Commissioner upheld the finding of the Income Tax Officer that the income was

assessable in the hands of Saiyed Musamiya Haiderbux Razvi but cancelled the protective assessment which was made in the name of the Roza Trust.

6.1 Against the order of the A.A.C., appeals were preferred by the Roza Trust before the Tribunal challenging the finding that the income in question was of Saiyed Musamiya Haiderbux Razvi and not of the Roza Trust, and that it was not exempted under section 11 of the said Act. According to the assessee Roza Trust, the Appellate Assistant Commissioner had committed an error in setting aside the protective assessment on the ground that the income was not the income of the Roza Trust instead on the ground that it was exempted under section 11 of the said Act.

6.2 In the appeals filed by Saiyed Musamiya Haiderbux Razvi, it was urged that the A.A.C. had erred in holding that the income of the trust was assessable in his hands and not in the name of Roza Trust and that it was not exempted under section 11 of the said Act.

6.3 The Department was aggrieved by the cancellation of protective assessment and in its appeals, challenged the order of the A.A.C. by urging that the protective assessment in the name of Roza Trust should not be cancelled.

7. The Tribunal took note of the fact that the Deputy Charity Commissioner had held that all the lands in question except the Rasulabad lands, were belonging to the public religious and charitable trust i.e. the Roza Trust. It noted that the Charity Commissioner had confirmed that order and had also held that the Rasulabad lands were belonging to the said trust. It took note of the book entitled "A History of Gujarat" by M.S. Commissariat (Professor of History and Former Principal, Gujarat College, Ahmedabad) to trace out the events that led to the establishment of the Roza Trust as a public charitable trust. It noted that Shah-E-Alam Estate was under the management of the Collector of Ahmedabad under the Court of Wards Act, from 1872 to 1877, 1896 to 1914 and 1948 to 1958. Considering the effect of the judgement dated 24th September 1957 of the Bombay High Court, in First Appeal No. 188 of 1952 which was filed against the decision of the 3rd Joint Civil Judge (S.D.) Ahmedabad in Civil Suit No. 72 of 1948, partly decreeing the suit filed by the senior widow of Saiyed Musamiya Imam Hyderbux against the other widow Mamubibi and her son Saiyed Musamiya Razvi and others, for a decree for administration of the estate of Saiyed Musamiya Hyderbux

and for appointment of a receiver etc., the Tribunal came to a finding that the said judgement did not operate as res judicata, because, the Roza Trust was not represented in those proceedings and the question whether the properties were public trust properties was not before the Court. It was, therefore, held that Saiyed Musamiya Razvi was not prevented from taking up the stand that the properties in question belong to the Roza Trust. The Tribunal took into consideration the inscription on the marble tablet placed at the entrance of the Roza Trust, the account of which was given in the book of Professor Commissariat and the sanad granted in 1670 by Aurangzeb assigning six villages for the maintenance of the tomb and its custodian and found that there was dedication of these lands of four villages for charitable and religious purpose. The Tribunal considered the said Sanad, a translation of which was submitted before it, and held that all the requirements of the public religious endowment were satisfied. It held that, as per the Sanad, one Saiyed Mohammad was appointed by the `Farman' of Aurangzeb as the Sajjadanashin and Mutawalli of the Roza and he was granted six villages comprising 80 Bighas and 17 Biswas of land exclusively for expenditure on the sacred mausoleum under the heads of expenditure : the tutors, people of the mosque, the seekers of knowledge, the carpet spreaders, the light kindlers, the travellers, and all other aspects of beneficience and charity and for Madad-E-Maash of the Sajjadanashin, his sons and descendants. The Tribunal held that, in the translation of the Sanad which was supplied to it, there was no omission and the names of villages were clearly mentioned. It was held that the primary and dominant purpose of the grant was public religious and charitable and the maintenance of the Sajjadanashin (Madad-E-Maash) was only incidental to the primary object of the wakf. It was also held that the evidence regarding establishment of the wakf was so predominant that inconsistent conduct of Saiyed Musamiya Razvi or his ancestors cannot displace the existence of the wakf. Considering the status of Sajjadanashin as the holder of a spiritual office in the Roza Trust, the Tribunal held that a reasonable expenditure on the maintenance of the Sajjadanashin and his family must be held to be expenditure incurred for a religious purpose, and therefore, the benefit of section 11(1)(a) would be available to the assessee Roza Trust for such expenditure. It was held that the actual expenditure not exceeding Rs.30,000=00 a year over the maintenance of the Sajjadanashin and his family was allowable and should not be included in the income of the Roza Trust. The Tribunal, however, held that the Sajjadanashin receives

such income by reason of his office and any monetary receipt in the hands of a person by reason of his office was the income in his hands and was taxable. Summarising its conclusions, the Tribunal held in paragraph 45 of its order, that the decision of the Bombay High Court in First Appeal No. 188 of 1952 did not operate as res-judicata and the Sajjadanashin Saiyed Musamiya Razvi was not prevented from taking up a stand that the properties belong to the Roza; that the assessee Roza was a wakf and the complex of buildings and the lands at Rasulabad were wakf properties belonging to it by dedication and user; that the lands at Vasna, Isanpur and Sarsa are wakf properties belonging to the Roza trust by reason of the Sanad of Aurangzeb; that the income spent by the assessee Musamiya Razvi on his maintenance as `Madad-E-Maash' was taxable in his hands; and that the actual expenditure on the maintenance of the Sajjadanashin and his family not exceeding Rs.30,000=00 a year, would not be included in the income of the Roza Trust. With these findings, the Tribunal restored the matter to the Income Tax Officer to assess the income of Rasulabad, Vasna, Isanpur and Sarsa lands as income of the Roza Trust and grant the benefit under section 11 of the said Act, subject to fulfillment of the conditions mentioned therein, bearing in mind that the income actually spent by the Sajjadanashin on his maintenance and that of his family not exceeding Rs.30,000=00 per year was not to be included in the income of the Roza Trust.

8. The learned Standing Counsel appearing for the Revenue argued before us that the judgement of the Bombay High Court in First Appeal No. 188 of 1952 was a judgement rendered within the jurisdiction of the Court and was binding on all the authorities under the Bombay Public Trusts Act, because, the suit was of the year 1948, while the Bombay Public Trusts Act came into force from 1950. It was argued that the income tax authorities were not bound by any decision of the Charity Commissioner under the Bombay Public Trusts Act as to the existence of the public trust or about the fact whether any property belonged to the public trust. It was submitted that, in the process of assessment, it was incidental for the assessing officer to decide as to whom the property belonged, and therefore, notwithstanding the powers of the Charity Commissioner under the Bombay Public Trusts Act, the assessing officer can take a different view under the provisions of the Income Tax Act as regards the ownership of the properties which may have been registered as the properties of the Trust. The learned counsel strongly contended that the authorities

under the Income Tax Act were functioning under the Central Law and therefore, they would not be bound by any decision taken by a functionary under the State law. Therefore, the tax authorities have independent powers under the said Act to decide the ownership of the immovable property for determining the question regarding the income received by the Public Trust and whether it was exempted under section 11 in light of the said provision read with section 143(2) and (3) of the said Act. It was further argued that the grant made by Aurangzeb was in favour of the Sajjadanashin and his family, and his descendants and therefore, it was a personal inam and cannot be treated as creation of a wakf. He therefore submitted that there was no dedication of the said lands to any religious or charitable purpose. It was also argued that, from the conduct of the Sajjadanashin and his family members, it was clear that they had treated the properties as if they were their private properties, and that is why, the administration suit was filed by one of the widows of the then Sajjadanashin which culminated in the decision of the Bombay High Court in First Appeal No. 188 of 1952, confirming the decree passed in the Administration Suit wherein the other widow and the present Sajjadanashin were parties. It was argued that the Tribunal had committed an error in fixing the amount of Rs.30,000=00 as an expenditure wholly incurred for religious purpose entitled to exemption under section 11 of the Act. According to him, such expenditure on Sajjadanashin and his family (Madad-E-Maash) was a private expenditure and not incurred for any religious purpose. He then argued that the authorities under the Bombay Public Trusts Act had committed an error in holding that the judgement of the Bombay High Court did not preclude them from taking a decision under the said Act, and that there was no bar of res-judicata. He submitted that the authorities under the Bombay Public Trusts Act were clearly bound by the decision of the Bombay High Court and could not have held that there was a public trust or that the properties in question were dedicated for religious and charitable purposes. It was submitted that, in any event, an application under section 72 of the Bombay Public Trusts Act was pending before the Ahmedabad City Civil Court and therefore, the decision under the Bombay Public Trusts Act registering the Roza Trust and showing the properties in question as the trust properties was not final. Even if it is to be treated as final for the purposes of the Bombay Public Trusts Act since that is a State law, the income tax authorities acting under the central law, i.e. the Income Tax Act, were in no way bound to follow the decisions taken under the Trusts Act. The learned

Standing Counsel finally argued that the record shows that, in the past, the said Roza was registered as a wakf under the Musalman Wakt Act, 1923, but later on, on 3/9/1934, it was deleted by the Collector from the list of wakfs. Therefore, it could not have been again decided under the Bombay Public Trusts Act that the said Roza was a public trust, and that its properties were public trust properties. Therefore, the properties in question are required to be held of the individual assessee i.e. the Sajjadanashin and the income was assessable in his hands and not in the hands of the Roza Trust. The learned Standing Counsel supported the reasoning of the Income Tax Officer, and contended that the findings of the Tribunal were not warranted by the material on record.

8.1 The learned Standing Counsel for the Revenue, in support of his arguments, cited the decision of this Court in Commissioner of Income Tax, Gujarat III v. Thobhandas Jivanlal Gajjar, reported in 109 ITR 296 to point out that a Division Bench of this Court has held that, it cannot be said as a broad proposition of law that the decisions of civil courts would operate as res judicata in the references so as to bind the Government, which was admittedly not a party to the proceedings before the civil courts, or would preclude the Income Tax Officer, in the course of assessment, to investigate in whose hands a particular income should be assessed. Reliance was also placed on the decision in Keshavlal Punjaram v. Commissioner of Income Tax & Wealth Tax, reported in 141 ITR 466, in which the ratio of the aforesaid decision in Thobhandas's case was followed, and it was held that the Tribunal had rightly taken the view that the decision rendered by the civil court in the circumstances pointed out cannot preclude the statutory exercise by the Income Tax Officer to form his own opinion.

9. The learned Senior Counsel, who appeared for the assessee, argued that, in view of the finding reached by the Charity Commissioner on 20-1-1966 in Appeal Nos. 60 and 71 of 1962 upholding the order of the Deputy Charity Commissioner dated 10-8-1962 registering the Roza Trust as a public trust and finding that the properties in question were the properties of the Roza Trust, it was not open to the Tax Authorities to take a different view of the matter. It was argued in the alternative that the finding reached by the Tribunal as to the ownership of the property was a finding of fact, which could not be challenged as perverse, because, it was based on the evidence on record. It was, therefore, not possible to

take any view as to the ownership of the property other than the one taken by the Tribunal. It was submitted that, in any event, it was quite clear from the evidence on record that the findings reached by the Tribunal are correct. As regards the amount of expenditure upto Rs.30,000=00, which was required to be taxed in the hands of Saiyed Musamiya Razvi, the learned Senior Counsel submitted that the questions referred at the instance of Saiyed Musamiya Razvi in respect thereof were not pressed. He however submitted that this amount should be a permissible deduction, because, it was expended for the maintenance of the Sajjadanashin. It was then argued that the controversy in the administration suit which culminated in the decision of the Bombay High Court in First Appeal No. 188 of 1952 was entirely different, and the Roza Trust was not a party therein, nor was the question as to whether the properties in question were the properties belonging to the Public trust directly and substantially in issue. It was submitted that the suit was contested on an assumption that the properties belonged to Sajjadanashin as his private properties. It was contended that, in any event, it was a settled legal position that there was no res judicata against a decision being taken under the Bombay Public Trusts Act on the basis of an earlier order of the Civil Court, which could not have decided the questions entrusted to the Charity Commissioner under that Act. It was also submitted that the Rasulabad land was not the property of the trust and ought to have been held to be the property of the Sajjadanashin.

9.1 In support of his contentions, the learned senior counsel for the assessee cited the following decisions :-

[a] The decision of the Bombay High Court in Zooleka Bibi v. Syed Zynul Abedin, reported in VI BLR at page 1058 was cited for the proposition that the office of the Sajjad-a-nashin is a religious office, and he may also be a Muttuvali of Wakf property dedicated to charitable purposes. On the facts of the case, the Court had come to the conclusion that, so far as the tomb of Syed Budruddin was concerned, he was not a religious person to whom any such sanctity was attached that his tomb could itself be considered a religious object. Consequently no property could be dedicated validly to support his tomb. It was held that there was no documentary or oral evidence in support of the alleged dedication.

[b] The decision of the Bombay High Court in

Narbheramji Gyaniramji Ramsnehi v. Vivekramji Bhagatramji Ramsnehi, reported in 41 BLR at page 939, was referred to for the observation that, a sanad granted under section 133 of the Bombay Land Revenue Code, 1879 was prima facie evidence of title. It was also held that such sanad was not conclusive evidence.

[c] The decision of Oudh High Court in Shah Mohammad Naim Ata v. Mohammad Shamshuddin, reported in AIR 1927 Oudh 113 was cited for the proposition that the property given to the Sajjadanashin of a `khanqah' for the upkeep of the buildings and the school connected therewith was the wakf property and therefore, cannot be attached in execution of a decree against Sajjadanashin, nor can the rents and profits of the said property be held to be liable to attachment. Relying on the decision of the Privy Council in Jewan Doss Sahu v. Shah Kubeeruddin, reported in AIR 1924 P.C. 109, it was held that, in order to constitute a wakf, it was not necessary to use the word `wakf' and so long as it appears that the intention of the donor was to set apart specific property or the proceeds thereof for the maintenance or support in perpetuity of a specific object or a series of objects recognized as pious by the Musalman Law, it amounts to a valid and binding dedication.

[d] The decision of a Division Bench of the Patna High Court in (Syed Shah) Muhammad Kazim v. (Syed) Abi Saghir, reported in AIR 1932 Patna 33 was cited to point out that, the essentials of a valid wakf are - an appropriator must destine the ultimate application of the income to the objects not liable to become extinct; the appropriation must be at once complete; there must be no stipulation in the wakf for sale of the property and expenditure of the price on the appropriator's necessaries; and perpetuity must be a necessary condition. It was also held that the provision for a Sajjadanashin was not a provision for the man, but for the institution. A `khankah' cannot exist and continue without a Sajjadanashin. A Sajjadanashin is an integral part of the institution and the central figure so to speak therein. Therefore, provision for his maintenance and that of his descendants is the provision for him as a head of the institution. It is therefore a trust and not a personal grant.

[e] The decision of the Bombay High Court in Mahomedhussein Daud Bhai v. Collector of Broach and Panchmahals, reported in AIR 1945 BOM. 157 was cited for the proposition that an inquiry under the Musalman Wakf Act, 1923 as amended by Bombay Act No. 18 of 1935 was confined to cases where existence of wakf was admitted. It was held that where the existence of the wakf was disputed, the District Judge had no jurisdiction to make an inquiry into its existence. This decision was relied upon to meet with the contention raised on behalf of the revenue that the Roza trust was earlier registered under the Musalman Wakf Act, but it was removed from the list by the collector on 3-9-1934.

[f] The decision of the Supreme Court in Dhaneshwarbuwa Guru Purshottambuwa v. The Charity Commissioner, State of Bombay, reported in AIR 1976 SC 871 was relied upon for the proposition that it would not be correct to say that the expression in this sanad (an ancient Royal grant) cannot be in any way determinative of the nature of the temple or religious endowment as a public trust. In the absence of anything to the contrary of a convincing nature, a grant by the Government in favour of the temple (a Devasthan) describing the property to be in charge of a manager leads to an unerring inference that the property is public religious endowment. It was held that when the origin of an endowment is obscure and no direct oral evidence is available, the Court will have to resolve the controversy about the character of the trust on documentary evidence, if any, the object and purpose for which the trust was created, the consistent manner in which the property has been dealt with or managed by those in charge, the manner in which the property has long been used by the public, the contribution of the public, and other aspects mentioned, which are all important elements in determination of the question whether a property is a private or a public religious endowment.

[g] The Full Bench Judgement of this Court in Shree Bhagvatacharya Narayancharya Public Trust v. State of Gujarat, reported in XLII (2) GLR 1356 was cited to point out that, in a group of matters in which even the Roza trust was one of the petitioners, the Full Bench held that, since

the Gujarat Devasthan Inam Abolition Act, 1969 and the Gujarat Devasthan Inam Abolition (Amendment) Act, 1977 were both placed in the Ninth Schedule, they were immune from any challenge on the ground violation of the fundamental rights. It was submitted that, in respect of these lands which were treated as Devasthan Inam lands, the Devasthan Inam was abolished under this Act and therefore, even the subsequent events show that these properties were Devasthan properties and were required to be assessed in the hands of the Roza Trust.

[h] The decision of the Supreme Court in Sri Agasthyar Trust v. Commissioner of Income Tax, reported in 236 ITR 23 was cited to point out that, in a case where there was nothing to indicate that it was brought to the notice of the Supreme Court in the earlier case before it (East India Industries' case), that the trust had been created by virtue of the document dated November 28, 1941 and there was no specific reference to that document in the judgement of the Court and the judgement did not indicate that the question relating to the validity of the deed dated July 1, 1944, was ever in issue before the Supreme Court, the earlier decision in East India Industries' case did not and could not preclude the appellants from contending that the deed dated July 1, 1944 was illegal and of no consequence, and what had to be seen was whether the assessee was a public charitable trust on the basis of the partnership deed dated November 28, 1941, and that the power to revoke the trust was taken away by a subsequent document dated August 26, 1943. It was held that the Tribunal was therefore right in considering the objects and coming to the conclusion that the appellant was a public charitable trust and was entitled to exemption under section 4(3)(1) of the Indian Income Tax Act, 1922 and section 11 of the Income Tax Act, 1961.

[i] A Division Bench judgement of this Court in a Letters Patent Appeal in Sayed Mohomed Baquir-El-Edroos Valde Sayed Jaffer-El-Edroos Sajjadnashin of Edroos Gadi v. Alimiya Mahmadmiya, reported in 13 GLR 285 was cited for the proposition that the statutory authority is bound to hold an inquiry under section 19(1) of the Bombay Public Trusts Act as laid down by the

statute and by no stretch of imagination, such statutory officer could ever be precluded from performing his statutory duties by invoking a rule of estoppel, as the result would be manifestly unjust, if the statutory inquiry as per the norms laid down in the statute is to be stultified. It was observed that the norms to be applied for determining the question as to what is a public trust are already settled by the Act and a statutory authority could never be precluded from taking fresh evidence on the ground that there is an estoppel as regards any particular issue because of some earlier inquiry which could never be as per the norms laid down under the Bombay Public Trusts Act. It was held that the earlier litigation under section 92 of the Civil Procedure Code, whether the wakf was a public trust or not within the meaning of the Act was never directly and substantially in issue and that the earlier finding could never preclude the present inquiry by reason of the doctrine of res-judicata.

[j] The decision of the Supreme Court in Commissioner of Income Tax v. Kamla Town Trust reported in 217 ITR 699 was cited for the proposition that the Civil Court had jurisdiction to rectify a trust deed and that the trust deed as amended was binding on the income tax authorities. The respondent trust was held to be entitled to exemption from income tax under section 11 of the Act subject to compliance with the conditions laid down therein.

10. It will be noticed that the Income Tax Officer had rejected the contention of the assessed Roza Trust on the ground that the judgement of the Bombay High Court in First Appeal No. 188 of 1952 rendered on 24th September 1957 made it conclusive that the properties of villages Isanpur, Vasna and Sansa were not to be treated as the properties of the Roza Trust, but they were a "jat-inam" in favour of the ancestors of Saiyed Hyderbax. It was further held that since Saiyed Musamiya was entitled for Madad-E-Maash and his ancestors had entered into many acts of transferring properties and creating mortgages and treating the properties as personal properties in the Court cases the lands in question were not the properties of the wakf. Observing that the Sajjadanashin Musamiya had full discretion to apply income of the trust to any charitable or non-charitable objects, the I.T.O. relying upon the decision of the Supreme Court in East India

Industries (Madras) Pvt. Ltd. v. Commissioner of Income Tax, reported in 65 ITR 611, held that the whole trust failed and no part of its income was exempted under section 11 of the said Act. According to the learned counsel for the Revenue, there was no valid reason for the appellate authority to upset these findings which were approved by the first appellate authority.

11. It will be noticed that the Tribunal, on its own appreciation of the evidence on record, came to the conclusion that the properties in question belong to the Roza Trust and therefore, its income was assessable in the hands of the Roza Trust. The Tribunal did not blindly rely upon the findings given by the Charity commissioner and made its own assessment of the material on record for reaching the said conclusion. In the process, it held that the decision of the Bombay High Court in First Appeal No. 188 of 1952 did not preclude inquiry into the question as to whether these properties were belonging to the said public trust or not. It was held that the decision of the Bombay High Court did not operate as res-judicata.

12. We have noted above the fact that, in the inquiry No. 176 of 1956 initiated under section 19 of the said Trusts Act of 1950, by order dated 7-3-1956, the Deputy Charity Commissioner held that the Roza trust was a public trust and that the property shown in the application was the property of the trust. The decision of the Deputy Charity Commissioner is at Annexure `H' in the paper-book No.2 of these proceedings. Though the inquiry was initiated suo motu, as noted in the order of the Deputy Charity commissioner, Syed Musamiya filled up the form for the registration of this public trust as the sole trustee thereof, which was exh.180 in those proceedings and from that stage, the inquiry which was started as a suo motu inquiry, was continued on the basis of that application exh.180. As per the said application exh.180, even according to the Sajjadanashin Musamiya, the villages of Vasna, Muktampur, Isanpur, Sarsa and Vasna Buzarg (which was under the management of the Collector), Kheda, were all Devasthan Inam alongwith survey No.35 of village Dani Limda on which the buildings of the Roza Trust were situated. The Deputy Charity Commissioner, referring to the decision of the Bombay High Court in First Appeal No. 188 of 1952, noted that it was arising out of the administration suit filed by the senior widow of Syed Hyderbax, the step-mother of the present Sajjadanashin for the administration of the estate of Syed Hyderbax, who died in 1948. That suit was filed on the basis that the entire estate of the deceased

including these villages were his private properties. The High Court confirmed the decision of the trial Court that these villages were not impartible and were heritable. A contention which is sought to be raised before us on the basis of the decision of the Bombay High Court was also raised to the effect that the said decision of the Bombay High Court conclusively showed that the villages were private properties of the sharers and not the properties of the public trust. The Deputy Charity Commissioner noted that the decision was given on 24-9-1957 and at that time, the inquiry under section 19 of the Trusts Act of 1950 was already pending and the questions whether the trust existed and was a public trust or not and whether a particular property was the property of the trust were required to be decided by the Deputy Charity Commissioner or by the Charity Commissioner in appeal as provided under the Act. No notice was issued to the Charity Commissioner in that appeal. The Deputy Charity Commissioner noted the following observations in the judgement of the High Court, "The properties being private properties of Saiyed Hyderbax, we are unable to appreciate how these properties can be regarded as impartible". The Deputy Charity Commissioner, therefore, held that there cannot be any bar of res-judicata by virtue of the decision in the said appeal and the other cognate appeal and the question whether the lands of these four villages were the property of the public trust was being determined for the first time in the inquiry under the Special Act, and that, it was not directly in issue before the High Court.

12.1 The Charity Commissioner also considered the proceedings which led to First Appeal No. 188 of 1952 before the High Court in paragraph 31 of his order and observed that the question as to whether Rasulabad lands belonged to Shah-E-Alam Roza or were private properties of Syed Imam Haiderbax was never put in issue in that suit and hence, there was no decision on that point. It was noted that the parties who were claiming these lands to be partible as if they were the properties of the deceased, were not interested in saying that the lands did not belong to the deceased, but belonged to the Roza Trust. It was also noted that the Shah-E-Alam Roza which was a public wakf was not a party in Civil Suit No. 72 of 1943 or in First Appeal No. 188 of 1952, nor was the Charity Commissioner a party in the appeal. It was observed that the judgement in the First Appeal was not a judgement in rem, but a judgement in personam.

12.2 The Charity Commissioner, on a very detailed and analytic consideration of the material on record, found

that it was satisfactorily established that Rasulabad lands belonged to and were of the ownership of Shah-E-Alam Roza, which was a public wakf. He negatived the contention of the Sajjadanashin Musamiya that Rasulabad lands belonged to him (see paragraph 24 to 36 of the order of the Charity Commissioner with findings in paragraph 36). The Charity Commissioner also came to a finding that the entire villages Isanpur and Sarsa also belonged to Shah-E-Alam Roza as a public wakf. (See paragraph 43 of the order of the Charity Commissioner). As regards village Vasna, on considering the entire oral and documentary evidence, he formed an opinion in paragraph 55 of the order that the entire village Fatehpur belongs to Shah-E-Alam Roza and that the persons named in the list exh. 29 were co-sharers only in the income of the village Vasna to the extent shown against their respective names. He held that they were neither owners nor co-sharers alongwith Shah-E-alam Roza in the corpus of the village. Thus, all the properties were held to be the properties of the Roza Trust which were registered as a public trust. Admittedly, there has not been any stay of the decision of the Charity Commissioner and therefore, as per the record maintained under the Trusts Act of 1950, the Roza Trust is a registered public trust and all these four villages are registered as the properties of the Roza Trust after a very detailed inquiry held by the authorities under the Bombay Public Trusts Act.

12.3 Thus, both the authorities, namely, the Charity Commissioner under the Bombay Public Trusts Act, 1950 as well as the Appellate Tribunal on its own reasoning, albeit, on the material before it which included the orders made by the Deputy Charity Commissioner and the Charity Commissioner, the documents such as sanad issued by Aurangzeb and the sanads of the Government, the survey settlement register and the historical account given in the textbooks, came to the same finding that these lands of the four villages belonged to the said public trust.

13. So far as the public trust of the nature of wakf is concerned, the registration of such public trust is done under the provisions of the Bombay Public Trusts Act, 1950 since the provisions of the earlier Wakf Act, 1954 and the later Wakf Act of 1995 were not extended to Gujarat. As provided by section 3(2) of the Wakf Act, 1954, it was to come into force in a State on such date as the Central Government may by notification appoint. Therefore, the said Act did not apply automatically to all the States. It was made applicable to Union territory of Hyderabad with effect from 15th January 1955

and therefore, it applied to the area known as Marathavada which was part of the State of Hyderabad till November 1, 1956. After Marathavada area became part of the State of Bombay under the States Re-Organisation Act, 1956, the said Act of 1954 continued to apply to that area. So far the Gujarat State is concerned, the Act of 1954 was applied to Kutch area from 15th January 1955 (i.e. before its formation on 1st May 1960) and therefore, the Act continued to apply to the Kutch area. Therefore, the Bombay Public Trusts Act, 1950 is applicable in Gujarat, except the area of Kutch to which the Wakf Act, 1954 applied. The Wakf Act of 1954 was repealed by the Wakf Act of 1995 which again has a provision under sub-section (3) of section 1 that it shall come into force in a State on such date as the Central Government appoint. It is in this background that the inquiry was rightly initiated under section 19 of the said Trusts Act of 1950 in respect of the Roza Trust and its properties.

13.1 Section 19 of the Bombay Public Trusts Act, 1950, inter alia, empowers the Deputy or Assistant Charity Commissioner to make an inquiry on his own motion for the purpose of ascertaining; (i) whether a trust exists and whether such trust is a public trust, and (ii) whether any property is the property of such trust, besides other matters which are enumerated under section 19. On completion of the inquiry, he is required to record his findings with reasons, as provided by section 20 and in accordance with the findings recorded, he is bound to make entries in the Register kept under section 17 of the Act. If appeals or applications are made under the Act, the entries will be made in accordance with the final decision of the competent authority provided by the Act, as laid down by section 21(1). Sub-section (2) of section 21 provides that the entries so made shall, subject to the provisions of the said Act and subject to any change recorded under its provisions that follow, be final and conclusive.

13.2 Section 79 of the Bombay Public Trusts Act, 1950 provides that, any question, whether or not a trust exists and such trust is a public trust or particular property is the property of such trust, shall be decided by the Deputy or Assistant charity Commissioner or the Charity Commissioner in appeal as provided by the Act. Sub-section (2) of section 79 lays down that the decision of the Deputy or Assistant Charity Commissioner or the Charity Commissioner in appeal, as the case may be, shall, unless set aside by the decision of the court on application or of the High Court in appeal, be final and

conclusive. This would mean that unless the decision is set aside by the Court on application or the High Court in appeal, it shall continue to operate.

13.3 Section 80 of the Bombay Public Trusts Act, 1950 lays down that, save as expressly provided in the Act, no civil court shall have jurisdiction to decide or deal with any question which is by or under the Act to be decided or dealt with by any officer or authority under the Act, or in respect of which the decision or order of such officer or authority has been made final and conclusive. Therefore, the Civil Court's jurisdiction to decide any question as to whether or not a trust exists and such trust is a public trust or particular property is a property of such trust which is required to be decided by the Deputy or Assistant Charity Commissioner or the Charity Commissioner in appeal and which is treated as final and conclusive until set aside by the court on application or the High Court in appeal, is expressly taken away by the said provision.

13.4 Civil Courts have, under section 9 of the Code of Civil Procedure, jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred, and as per Explanation I, a suit in which the right to property or to an office is contested is a suit of a civil nature, notwithstanding that such right may depend entirely on the decisions of questions as to religious rites or ceremonies. Section 9 of the CPC empowers the Civil Court to try all suits of a civil nature except where the jurisdiction of the civil court was expressly or by necessary implication barred. The effect of section 80 of the Bombay Public Trusts Act, 1950 was to expressly take away the jurisdiction of the civil court in respect of the aforesaid disputes which could now be inquired and decided under the said Act only by the Deputy / Assistant Charity Commissioner or the Charity Commissioner in appeal. In other words, the jurisdiction to decide the questions as to the title to the property which ordinarily could be decided by a civil court, was in context of public trusts transferred to the authorities created under this special Act. The entries made in the Registers maintained in the Public Trusts Registration Office by the Deputy or Assistant Charity Commissioner under section 17 of the said Trusts Act of 1950 are to be treated as final and conclusive, as provided by sub-section (2) of section 21.

13.5 In this context, we may also note the provisions of section 35 of the Indian Evidence Act, which provide

that, an entry in any public or other official book, register, or record, stating a fact in issue or relevant fact, and made by a public servant in the discharge of his official duty, or by any other person in performance of a duty specially enjoined by the law of the country in which such book, register, or record is kept, is itself a relevant fact. Thus, such entries in the Register of public trusts showing whether a trust is registered as a public trust and that the properties are registered in the name of the trust would be relevant material before an authority or a court to decide as to whether the public trust existed and as to whether the properties shown in its name are really the properties of the public trust.

14. The functions of the assessing officer are to make inquiry before assessment under section 142 and to make assessment order under section 143 of the Income Tax Act, 1961. For the purpose of inquiry before assessment, the assessing officer is required to serve a notice under section 142(1) of the Act, inter alia, requiring the person concerned to furnish in writing and verified in the prescribed manner information of all assets of the assessee. As regards the assets and liabilities not included in the account, he is required to get prior approval of the Joint Commissioner before requiring the assessee to furnish a statement of all such assets and liabilities. The assessee is required to furnish particulars in the prescribed form, as provided in the Rules framed under the said Act. In order to ensure that the assessee has not under-estimated the income, the assessing officer shall serve notice under section 143(2) on the assessee requiring him to attend his office or to produce or cause to be produced any evidence on which the assessee may rely in support of the return. The assessing officer is empowered to require the assessee to produce evidence on specified points under sub-section (3) of section 143 and after taking into account all the relevant material which he may have gathered, the assessing officer makes assessment of the total income or loss of the assessee and determines the sum payable by him or sum that may be refundable on the basis of such assessment. When the assessee fails to comply with the notice, the assessing officer, after taking into account all relevant material which he may have gathered, has to make the assessment of the total income or the loss to the best of his judgement under section 144 of the said Act.

14.1 For the assessment of income, a question may often arise before the tax authority as to whether the

particular property belongs to the assessee or not. If an assessee has concealed particulars of an asset from which income is derived, it would be within the powers of the assessing officer to trace it out for the purpose of ascertaining the income of the assessee therefrom.

14.2 Under section 11 of the said Act, it is provided that, subject to sections 60 to 63 thereof, the income mentioned therein shall not be included in the total income of the previous year of the person in receipt of the income and this includes the income derived from property held under trust wholly for charitable or religious purposes to the extent to which such income is applied to such purposes in India, as laid down in the said provision. When exemption is claimed under section 11(1) of the said Act, a question may arise before the tax authority whether the property from which income is derived is a property held under trust wholly for charitable or religious purposes. Therefore, the assessing officer may call upon the person claiming such exemption to produce evidence in support of his claim that the property in question was held under trust of such nature. Such inquiry is not an inquiry for adjudicating upon the title of the property, but only an inquiry aimed at ascertaining whether the exemption claimed under section 11 is warranted. During such inquiry, which is undertaken in the process of making of the assessment order, the nature of evidence adduced or gathered may be in form of documents of title or grants, entries from the trust register showing whether the trust is registered as a public trust, and as to whether the properties in question are registered as the properties of the trust and other adjudications, having bearing on the title of the property, made by any competent forum.

15. Thus, the scope of the inquiry under the Income Tax Act, 1961 is wholly different from the scope of the inquiry under the Bombay Public Trusts Act, 1950. When the evidence that may be adduced before the assessing officer or gathered by him during the assessment proceedings, conclusively shows that the trust is a registered public trust, and that the property from which the income is derived is the property held under trust wholly for charitable or religious purposes, the tax authority would ordinarily have to accept such evidence and proceed to determine what income is derived from such property held under trust and to what extent it is applied to such purposes. If, however, the question whether the property is held by the trust, or whether there exists such trust, has not been finally adjudicated by the competent forum, the assessing officer can even go

into the question of title for the limited purpose of deciding what income is derived from the property held under such trust. It however cannot be countenanced that even where there is a final adjudication of the fact by a competent statutory forum under the Bombay Public Trusts Act, 1950 that there is a public trust, and that particular property is held by such public trust wholly for charitable and religious purposes, the assessment officer can simply ignore those findings, which may in a given case have been upheld till the Apex Court, and play a different tune by pronouncing that there is no such public trust or that the property in question is not that of the public trust despite these having been so registered under the provisions of the said Act. The authorities functioning under the laws made by parliament are not required to ignore the provisions of the laws made by the legislation of the State which operate in full force within the State. To say that assessment officer acts under the Law made by Parliament and therefore, is not bound by anything done under the law made by the legislature of the State, as was sought to be vehemently urged on behalf of the Revenue, is to ignore the constitutional scheme of distribution of legislative powers. Indeed, in case of a conflict between law made by Parliament and law made by the Legislature of a State, where any provision of a law made by the Legislature of State is repugnant to any provision of a law made by Parliament in exercise of its legislative powers, the law made by Parliament, whether before or after the law made by the Legislature of the State, shall prevail, and the law made by the Legislature of the State shall to the extent of repugnancy, be inoperative but so long only as the law made by Parliament continues to have effect, as provided by Article 251 of the Constitution. But, surely when the legislative provisions operate in different fields as in the present case, there can arise no question of repugnancy and the authorities acting under the laws would be bound by any action validly taken under the respective laws. We cannot, therefore, subscribe to the extreme view canvassed for the Revenue that the Income Tax Authority acting under the Income Tax Act is not bound by the valid conclusive findings under the Bombay Public Trusts Act, 1950 that a trust is a public trust, and that a particular property is that of such trust. The adjudicatory function of the tax authority in a case where he finds that the title is finally and conclusively determined under the law would start for the purpose of assessment where the adjudicatory function of the Charity Commissioner has ended by such conclusive determination, unless the central statute otherwise provides. Thus, while it is true that the tax authority,

during the assessment proceedings, can always inquire into the question of ownership of the property and decide the issue in context of the relevant provisions of the said Act, in order to ascertain the income of the assessee for bringing it to tax, it will not be open for the tax authorities to ignore the relevant evidence of the statutory registration of a public trust and the fact of the properties having been registered as the properties of such public trust under the provisions of the Bombay Public Trusts Act, 1950. The tax authority is required to give due weightage to the material which is relevant and which shows the registration of a public trust and its properties under the provisions of the Bombay Public Trusts Act, 1950, in light of the provisions of sections 19, 21(2), 79 and 80 thereof, and, to assess the person concerned, keeping in view such relevant material which may be produced during the assessment proceedings. Therefore, the Tribunal could have safely relied upon the findings of the Charity Commissioner reached under the Bombay Public Trusts Act, 1950 for holding that the Roza trust was a public trust and that the lands shown in the register were the properties of the said trust. The Tribunal has, however, on its own, after considering all the material which was also the subject matter of consideration before the Charity Commissioner, come to its own finding that the properties in question belong to the Roza trust which was a public trust. We do not find any valid reason to disturb the conclusions reached by the Tribunal and in fact, we are of the opinion that the conclusions are fully warranted by the material on record.

16. As noted above, the Deputy / Assistant Charity Commissioner have been vested virtually with the powers of a Civil Court on deciding the questions as to whether public trust existed and as to what were the properties of such trust and the jurisdiction of the civil court is expressly barred by the provisions of section 80 of the Bombay Public Trusts Act, 1950. The orders of the Deputy / Assistant Charity Commissioner would, therefore, on these aspects stand on the same footing as the declaration that may earlier have been made by a civil court and which would have operated as judgement in rem. As a general proposition, a judgement has no effect upon the persons who are neither parties nor in privity with a party. Instead of personal judgements directing a defendant to pay money or deliver possession or do or refrain from doing something, there may be judgements affecting interests in a thing. These are judgements in rem where a court has power over a thing although not over all persons whose interests in it may be affected.

Such judgement in rem will affect all interests of everyone in the thing. Judgements in rem are rendered in proceedings for registration of titles to land, in admiralty suits when the court has jurisdiction over a ship, in proceedings for forfeiture of things under revenue laws or statutes against use of things in particular unlawful activities (See Jurisprudence by Roscoe Pound Volume 8 para 147 at page 606).

16.1 The finding of the Deputy / Assistant Charity commissioner pursuant to an inquiry under section 19 of the said Trusts Act that there is a public trust, and that particular property is the property of such trust, is required to be entered into the register and the entries so made subject to the provisions of the Act or any change that may be recorded are treated as final and conclusive. As per section 79, the Assistant / Deputy Charity Commissioner has exclusive jurisdiction to give such findings. These findings operate as findings in rem and therefore, cannot be ignored by the authorities under the Income Tax Act.

17. We may now proceed to consider whether the judgement of the Bombay High Court in First Appeal No. 188 of 1952 precluded the consideration of the question, whether the Roza Trust was a public trust and whether the properties which were treated in the administration suit as private properties were, in fact, the properties of the public trust. As noted above, both the Income Tax Tribunal as well as the Charity Commissioner have held that the decision of the Bombay High Court did not operate as res-judicata, because, the Roza Trust was not a party before it and the question whether the properties were of the said public trust was not directly and substantially in issue.

17.1 In this context, we may note that a Division Bench of this Court in Kuberbhai Shivdas v. Mahant Purshottamdas Kalyandas, reported in II GLR 564, while considering the provisions of the Bombay Public Trusts Act, 1950, held that the inquiry made by a Deputy or Assistant Charity Commissioner is by no means an administrative or an executive inquiry but a judicial inquiry, and that the inquiry is not only for the purpose of registration. It was held that the Bombay Public Trusts Act was a complete Code for dealing with matters set out in sections 18 and 19 and recourse must be had to the procedure laid down in the Act. It was also held that the provisions of section 79 shall, with a finding of any entry made under sections 19, 20 and 21, constitute not merely an administrative order for the

purpose of registration only or an order as between the Charity Commissioner and the Trustee only, but such a finding and an entry made on the basis thereof are as regards the trust, the properties belonging to it and mode of succession to the office of the trustee. In Trustees of Jam Jodhpur Sthanakvasi Vardhman Vanik Jain Sangh v. Trambaklal Jivram, reported in XXVIII (1) GLR 550, it was held by this Court that the jurisdiction of the civil courts was taken away in respect of matters which are to be decided by the Assistant or Deputy Charity Commissioner or the Charity Commissioner in appeal and if the civil court decided such issues, it would be acting beyond its powers and its judgement will not operate as res-judicata. Similar view was taken in Sherasiya Saji Alavadi Momin v. State of Gujarat, reported in XXXVI (1) GLR 513 and it was held that only the Deputy or Assistant Charity Commissioner can decide whether any property is a property of a public trust. In Alimiya Mahmadmiya v. Sayed Mohomed Baquir El-Edroos Valde Sayed Jaffer El-Edroos, reported in IX GLR 1002, it was observed that, in order to attract the doctrine of res-judicata, the law applicable to the subject matter at both the times must be the same.

17.2 In The Municipality of Taloda v. The Charity Commissioner, Bombay, reported in AIR 1968 SC 418, where the previous suit was brought by the Municipality against a trespasser for declaration of its title to the suit property and eviction of trespasser and recovery of possession and in which it was contended by the trespasser that the suit property was held in public trust for saints and therefore, as a Sadhu, he was entitled to reside therein and the suit came to be decreed, it was held that a subsequent application under section 19 of the Bombay Public Trusts Act, 1950 for determining that the property was held under a public trust of a religious or charitable character, was not barred by rule of res-judicata. (See paragraph 6 of the judgement). This decision puts the matter beyond any pale of doubt, the settled legal position that finding of a Civil Court on the question whether a public trust exists and about the properties of such trust cannot operate as res judicata in the proceedings under section 19 of the Bombay Public Trusts Act, 1950. We, therefore, are in full agreement with the Tribunal that the judgement of the Bombay High Court in First Appeal No. 188 of 1952 did not preclude the authorities from deciding the question whether the Roza Trust was a public trust and about the properties of that trust under the provisions of the Bombay Public Trusts Act, 1950.

18. The contention raised on behalf of the Revenue that expenses incurred on Sajjadanashin by the Roza Trust cannot be exempted under section 11 of the Act, is misconceived. The provision for a Sajjadanashin is not a provision for the man, but for the institution, as noted above. The Sajjadanashin as a spiritual leader is an integral part of the Roza Trust and the expenses which may be incurred on the Sajjadanashin by the Roza Trust would not be expenses incurred for a private purpose. As held by the Patna High Court in Mohammad Kazim (supra), the provision for the maintenance of the Sajjadanashin is the provision for him as the head of the institution and it is a trust and not a personal grant. We respectfully agree with that view. Such expenditure on the Sajjadanashin also described as Madad-E-Maash was included within the definition of `wakf' under section 3(1) of the Wakf Act, 1954 which can provide guidance in the matter. As per that definition, `wakf' meant the permanent dedication by a person professing Islam or any other person, of any movable or immovable property for any purpose recognised by the Muslim law as pious, religious or charitable, and included, inter alia, grants including `Madad-E-Maash', as provided in sub-clause (ii) of clause (l) of section 3 of that Act. Therefore, there is no reason to disturb the finding of the Tribunal on this count.

19. The contention that the Roza Trust was once registered as wakf under the Musalman Wakf Act, 1923 and later, it was deleted on 3-9-1934 by the Collector and therefore, that decision taken by the competent authority finally concluded that there was no public trust any more, and this would preclude any inquiry under the provisions of the Bombay Public Trusts Act, 1950, is thoroughly misconceived for the simple reason that the Income Tax Authorities have not decided non-existence of a public trust on this ground, and further, because, there was no decision of the District Court under the Musalman Wakf Act, 1923 for removing the wakf from the list. It will be noticed from the provision of section 6(c)(5) that the Court acting under the said section could not try or determine any question of title of any person claiming adversely to the wakf. Therefore, the Court could not have adjudicated any question as to whether the property belong to the wakf or the Sajjadanashin. As held by the Bombay High Court, an inquiry under section 6(c)(1)(i) of the Musalman Wakf Act, 1923 was confined to cases where the existence of the wakf was admitted and where the existence of the wakf was disputed, even the District Judge had no jurisdiction to make any inquiry. We do not know under what

circumstances, on 3-9-1934, the wakf was deleted from the list of wakfs by the Collector on the basis of an application which was made before him. No contention was canvassed on this basis before any of the authorities below. Even if any such order removing the wakf from a list of wakfs was made by the Collector, that would not preclude an inquiry under the Bombay Public Trusts Act, 1950. It is not as if on such removal of wakf from the list maintained under the Musalman Wakf Act, 1923, the question of there being a public trust and the property being of that public trust, can never arise thereafter. The relevant and reliable material on record clearly points to existence of such a public trust and to the fact that these lands were the properties of that public trust, as held by the Charity Commissioner and as also held independently by the Tribunal, warranting no interference by this Court by taking a different view of the matter.

20. In the above view of the matter, we are of the opinion that the Tribunal was right in holding that the judgement of the Bombay High Court did not operate as res-judicata, and that Saiyed Musamiya was not prevented from taking up a stand that the properties belonged to the Roza Trust. It was also right in holding that the Roza Trust, was a wakf and that the complex of buildings and the lands at Rasulabad were the wakf properties belonging to it, and that the lands at Vasna, Isanpur and Sansa were also wakf properties belonging to the Roza Trust. It also correctly held that the exemption under section 11 of the said Act was available to the assessee Roza Trust in respect of the income spent as `Madad-E-Maash' on the maintenance of the Sajjadanashin, his family and his descendants to the extent of Rs.30,000=00 a year, and that the exemption under section 11 of the said Act was available in respect of that amount to the aforesaid extent. The Tribunal has also rightly held that the exemption under section 11 of the Act was available to the assessee Roza Trust, provided the conditions mentioned therein were fulfilled. It, therefore, rightly restored the matter to the assessing officer to assess the income of Rasulabad, Vasna, Ishanpur and Sansa lands as the income of the Roza Trust and to grant benefit under section 11 of the said Act, subject to the fulfillment of the conditions mentioned therein. The Tribunal also rightly held that the amount of Rs.30,000=00 a year received by the Sajjadanashin would be the income to be taxed in his hands.

21. In the above view of the matter, all the questions referred to this Court by the Tribunal are

answered in the affirmative in favour of the assessee trust. The Reference stands disposed of accordingly with no order as to costs.

APRIL 10, 2002 [R.K.ABICHANDANI, J.]

[KUNDAN SINGH, J.]

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